ATTORNEY FOR APPELLANT:

JOHN T. WILSON
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

GROVER WHITINGER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0609-CR-789
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0604-FA-141

April 5, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Grover Whitinger appeals his aggregate sentence of forty-three years, with four years suspended, for two counts of child molesting as Class A felonies and three counts of child molesting as Class C felonies. On appeal, Whitinger raises two issues, which we restate as whether the trial court properly sentenced Whitinger and whether Whitinger's sentence is inappropriate given his character and the nature of the offenses. Concluding that the trial court properly sentenced Whitinger, and that his sentence is not inappropriate, we affirm.

Facts and Procedural History

Before reciting the facts, we note that Whitinger failed to properly present the facts of the case to this court. Instead, Whitinger's Statement of the Facts contains only what should be included in the Statement of the Case, i.e., the procedural history and the case's disposition. See Ind. Appellate Rule 46(A)(5), (6). This failure not only constitutes a violation of the appellate rules, but also has resulted in Whitinger failing to provide us with a basis for determining whether his sentence is improper or inappropriate. We could merely conclude that Whitinger has failed to present any issue for review. However, the State's appellate brief includes a brief statement of the facts, and we can discern other underlying facts from the appendix and transcript. Given our strong preference for deciding issues on the merits, we will address Whitinger's claim. See e.g., Downs v. State, 827 N.E.2d 646, 651 (Ind. Ct. App. 2005), trans. denied.

The following events took place sometime between January 2004 and March 31,

2006. On two occasions, Whitinger penetrated his seven-year-old granddaughter's vagina with his finger. On a third occasion, Whitinger instructed his granddaughter to touch his penis. On a fourth occasion, Whitinger kissed his granddaughter on "her lower tummy area in a sexual fashion." Transcript at 20. The fifth occasion "involves fondling or touch[ing] of [a different granddaughter] or [Whitinger] with the intent to arouse or satisfy [Whitinger's] sexual desires." Id. This other granddaughter was either two or three years old at the time.

On March 31, 2006, the first granddaughter gave a statement to police describing Whitinger's conduct. That same day, police arrested Whitinger, who subsequently gave a statement to police admitting his conduct. Whitinger initially entered a plea of not guilty on April 3, 2006. However, Whitinger changed this plea to one of guilty on May 31, 2006. This plea was not made pursuant to a plea agreement. The trial court held a guilty plea hearing that day and accepted the plea.

On June 12, 2006, the trial court held a sentencing hearing and issued a Sentencing Order. In the Order, the trial court found as an aggravating circumstance that Whitinger "violated a position of trust on members of immediate family." Appellant's Appendix at 21. At the sentencing hearing, the trial court also noted that one of the victims was significantly below the statutory age of fourteen. See Ind. Code § 35-42-4-3(A)(1), (B). In the Order, the trial court identified Whitinger's guilty plea and remorse as mitigating circumstances. At the hearing, the trial court also recognized that Whitinger had led a law-abiding life up to his commission of these crimes. The trial court stated that "although there [was] . . . one more mitigating circumstance than aggravating circumstance, the aggravating circumstances still

predominate and have greater effect in the sentencing in this case than the mitigating circumstances do." Tr. at 41. The trial court sentenced Whitinger to thirty-five years for both counts of child molesting as Class A felonies (counts I and II), eight years for two counts of child molesting as Class C felonies (counts III and IV), and eight years with four years suspended for the last count of child molesting as a Class C felony (count V). The trial court ordered that counts I through IV run concurrently, and that count V run consecutively to counts I through IV. Additionally, the trial court ordered that Whitinger be placed on probation for four years following his release. Whitinger now appeals his sentence.

Discussion and Decision

I. Propriety of Whitinger's Sentence

Under our standard of review, sentencing determinations are within the sound discretion of the trial court, and we will reverse only for an abuse of discretion. Henderson v. State, 848 N.E.2d 341, 344 (Ind. Ct. App. 2006). We will find the trial court abused its discretion only when its decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

Because of the timing of events in this case, we must first discuss the recent change in Indiana's statutory sentencing scheme. In 2004, the United States Supreme Court decided Blakely v. Washington, 542 U.S. 296 (2004), an opinion that called into question the constitutionality of Indiana's sentencing scheme. Our legislature responded to Blakely by amending our sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App.

2006), trans. denied. Based on the record, Whitinger may have committed some of the criminal offenses before this statute took effect,[1] but was sentenced after. Under these circumstances, there is a split on this court as to whether the advisory or presumptive sentencing scheme applies. Compare Settle v. State, 709 N.E.2d 34, 35 (Ind. Ct. App. 1999) (sentencing statute in effect at the time of the offense, rather than at the time of conviction or sentencing, controls) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and therefore application of advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though offense was committed before). Our supreme court has not explicitly ruled which sentencing scheme applies in these situations, but a recent decision seems to indicate that the date of sentencing is the critical date. In Prickett v. State, 856 N.E.2d 1203 (Ind. 2006), the defendant committed the crimes and was sentenced prior to the amendment date. In a footnote, our supreme court states that "[w]e apply the version of the statute in effect at the time of Prickett's sentence and thus refer to his 'presumptive' sentence, rather than an 'advisory' sentence." Id. at 1207 n.3 (emphasis added) see also Davidson v. State, 849 N.E.2d 591 n.4

[1] In its brief, the State argues that Whitinger committed his crimes in 2005 and 2006, and that therefore, the advisory sentencing scheme applies. Appellee's Brief at 3. First, the advisory sentencing scheme did not come into effect until April 25, 2005. Depending on how our supreme court holds, any crimes committed in 2005 prior to April 25, may fall under the presumptive sentencing scheme. Second, in its statement of facts, the State indicates that Whitinger committed the offenses between January 2004 and September 2006. The charging information indicates that Whitinger committed the offenses between January 2004 and March 31, 2006. We decline the State's invitation to assume that Whitinger committed all the offenses after April 25, 2005.

(Ind. 2006) ("[S]ince [defendant] was sentenced prior to 2005, we analyze his sentence under the former system." (emphasis added)).

Under the presumptive sentencing scheme, if the trial court imposes a sentence in excess of the statutory presumptive sentence, it must identify and explain all significant aggravating and mitigating circumstances and explain its balancing of the circumstances. Rose v. State, 810 N.E.2d 361, 365 (Ind. Ct. App. 2004). Although our supreme court has not yet interpreted the amended statute, its plain language seems to indicate that under the advisory scheme, "a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances." Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006), trans. denied. However, if a trial court does find, identify, and balance aggravating and mitigating factors, it must do so correctly, and we will review the sentencing statement to ensure that the trial court did so. See Ind. Code § 35-38-1-3 ("if the court finds aggravating circumstances or mitigating circumstances, [the trial court shall record] a statement of the court's reasons for selecting the sentence that it imposes"). Therefore, because the trial court here identified and weighed aggravating and mitigating circumstances, the analysis and result are the same under both sentencing schemes, and we need not determine the issue of retroactivity herein. See Primmer v. State, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006), trans. denied.

Whitinger argues that the trial court abused its discretion by imposing a "maximum sentence." Appellant's Br. at 8. We initially note that the trial court did not sentence Whitinger to the maximum sentence for either of his Class A felony convictions. The

maximum sentence for a Class A felony is fifty years. Ind. Code § 35-50-2-4. On both Class A felony convictions, the trial court sentenced Whitinger to thirty-five years, five years above the advisory or presumptive sentence, but fifteen years below the maximum. Id. The trial court did sentence Whitinger to maximum eight-year sentences for all three Class C felony convictions. Ind. Code § 35-50-2-6(a).

Whitinger also argues that the trial court improperly sentenced him because it "failed to consider significant mitigating circumstances." Appellant's Br. at 8. However, Whitinger does not argue that the trial court actually failed to find any mitigating circumstances, and it is apparent that he is arguing that the trial court merely did not assign adequate weight to the mitigating factors of his guilty plea and lack of criminal history.

Although the trial court has an obligation to consider all mitigating circumstances identified by a defendant, it is within the trial court's sound discretion whether to find mitigating circumstances. Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), trans. denied. We will not remand for reconsideration of alleged mitigating factors that have debatable nature, weight, and significance. Id. Also, the trial court is not required to weigh the mitigators as heavily as would the defendant. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). A single aggravator may be the basis for an enhanced sentence. Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied.

We have long held that a defendant who pleads guilty deserves some benefit in return. See Williams v. State, 430 N.E.2d 759, 764 (Ind. 1982). When sentencing a defendant, the trial court should consider a guilty plea a mitigating circumstance. Francis v. State, 817

N.E.2d 235, 237 n.2 (Ind. 2004). However, a guilty plea is not inherently considered a significant mitigating circumstance. Id. at 238 n.3; Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999). The significance of a guilty plea may be reduced for a variety of reasons, one of which is if substantial admissible evidence existed of the defendant's guilt. Scott v. State, 840 N.E.2d 376, 383 (Ind. Ct. App. 2006), trans. denied. Under these circumstances, the defendant's plea may be viewed as a pragmatic decision, rather than a true desire to accept responsibility for the crimes. See Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied.

Here, the trial court found that Whitinger's guilty plea was a mitigating circumstance. Thus, this is not a situation where we fear the trial court may have extended no weight at all to Whitinger's plea. As Whitinger's granddaughter had provided a detailed report of Whitinger's conduct to the police, and Whitinger had given a statement admitting all the conduct, there was significant and substantial admissible evidence of Whitinger's guilt. As Whitinger's attorney stated at the guilty plea hearing, "I reviewed [Whitinger's] statement, he gave a full confession to all of the elements, so in light of that, there is no advantage of having a trial, in spite of the fact there's no plea agreement in this case." Tr. at 22. Although Whitinger's plea is certainly entitled to weight, it does not follow that a sentence above the advisory or presumptive sentence is improper.

Whitinger also argues that the trial court should have afforded his lack of criminal history more weight. We recognize that the legislature has determined that a lack of criminal history is an important enough consideration to enumerate it in the statutory list of mitigating

circumstances that the trial court may consider, see Ind. Code § 35-38-1-7.1(b)(6), and that "[this] statute appropriately encourages leniency toward defendants who have not previously been through the criminal justice system." Biehl v. State, 738 N.E.2d 337, 339 (Ind. Ct. App. 2000), trans. denied. However, Whitinger, for at least two years, had been molesting his granddaughters, a circumstance that indicates his life was not completely law-abiding. See Bostick v. State, 804 N.E.2d. 218, 225 (Ind. Ct. App. 2004) (although defendant lacked criminal history, evidence indicating she had a substance abuse problem and engaged in a sexual relationship with a fifteen-year-old showed she "was leading a less than law-abiding life"). Again, Whitinger's lack of criminal history, although entitled to weight, does not render a sentence above the advisory or presumptive sentence inherently improper.

In addition to the reduced weight of two of the mitigating circumstances in this case, both aggravating circumstances found by the trial court were valid. The trial court found as an aggravating circumstance the fact that Whitinger molested a member of his immediate family with whom he was in a position of trust. Whitinger's repeated molestation of his seven-year-old granddaughter clearly constitutes a substantial aggravating circumstance. See Ind. Code § 35-38-1-7.1(a)(8) (listing the offender's position of trust as an aggravating circumstance that the trial court may consider); cf. Winters v. State, 727 N.E.2d 758, 762-63 (Ind. Ct. App. 2000), trans. denied (where defendant repeatedly molested teenage daughter, eight-year sentence for child molestation was proper). Although an element of the child molestation statute under which Whitinger was convicted is that the victim be under the age of fourteen, the trial court's recognition that one of the victims in this case was significantly

below this age was also proper. See Stewart v. State, 531 N.E.2d 1146, 1150 (Ind. 1988).

The trial court recognized Whitinger's guilty plea and lack of criminal history as mitigating circumstances, but used its discretion to determine that the aggravating circumstances in this case were more substantial. In light of the fact that Whitinger pled guilty, at least in part,[2] based on a pragmatic decision, and that he had committed his offenses over a substantial period of time, we cannot say that the trial court abused its discretion in determining that the aggravating circumstances outweighed the mitigating circumstances. Although Whitinger would give his guilty plea and lack of criminal history more weight than did the trial court, the trial court need not give mitigating factors the same weight as would the defendant. Smallwood, 773 N.E.2d at 263; see also Bostick, 804 N.E.2d at 225. We conclude that the trial court did not abuse its discretion in ordering the thirty-five year sentences for the two counts of Class A felony child molestation, and maximum eight-year sentences for the three counts of Class C felony child molestation.

II. Appropriateness of Whitinger's Sentence

When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005).

In arguing that his sentence is inappropriate, Whitinger again points to his guilty plea,

remorse, and lack of criminal history. He also argues, "[a] maximum sentence permitted by law should be reserved for the very worst offenders." Appellant's Br. at 12. While we recognize that we have made this statement, as we have pointed out previously:

> If we were to take this language literally, we would reserve the maximum punishment for only the single most heinous offense. . . . We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character.

Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied. We also point out that although the trial court sentenced Whitinger to the maximum sentence for the three Class C felonies, it ordered that two of these counts run concurrently to the Class A felony sentences, and that it suspended four years of the maximum sentence it ordered to run consecutively. We also note that it ordered that the sentences for the two convictions for Class A felony child molestation run concurrently. In all, Whitinger received an aggregate forty-three year sentence, with four years suspended, for repeatedly molesting his seven-year-old granddaughter on four separate occasions, and molesting his two- or three-year-old granddaughter. The fact that Whitinger took advantage of such vulnerable victims not only affects our determination that the nature of the offense warrants the trial court's sentence, but also speaks volumes about Whitinger's character. We recognize that Whitinger has expressed deep remorse, and that other than this ongoing molestation, he had lived a law-abiding life. However, given the nature of these offenses, and Whitinger's character as

---

[2] Whitinger stated at his guilty plea hearing that he was pleading guilty "to save this child to have to go through another thing." Tr. at 21.

evidenced by his taking advantage of his position of trust, we cannot say that a forty-three year sentence is inappropriate.

Conclusion

We conclude that the trial court properly sentenced Whitinger, and that the sentence is not inappropriate given the nature of the offense and Whitinger's character.

Affirmed.

BAKER, C.J. and DARDEN, J., concur.